Supreme Court, U. S.
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IN THE

Supreme Court of the United States

OCTOBER TERM, 1976

76-6761

NO. _____

DRESSER INDUSTRIES, INC.,
Petitioner

v.

EVERETT C. WEBB,
Respondent

BRIEF IN OPPOSITION TO PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

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COMES NOW the respondent EVERETT C. WEBB (referred to as the Plaintiff or the Appellee in the opinions of the Courts below), and files this Brief in Opposition to the Petition for a Writ of Certiorari to the United States Court of Appeals for the Fifth Circuit, urging that such petition be in all things denied, and in support thereof would show this Honorable Court the following:

I.

OPINIONS BELOW

The opinion of the Court of Appeals for the Fifth Circuit is reported, see *Webb v. Dresser Industries,* 536 F.2d 603 (5th Cir. 1976), rehearing denied (1976), and is contained in Appendix A of the Petitioner's Application for the Writ of Certiorari.

The opinion of the United States District Court for the Southern District of Texas is unreported, and is contained in Appendix D of the Petitioner's Application for the Writ of Certiorari [hereinafter Petitioner's Brief].

II.

JURISDICTION

The Respondent does not contest the statement of jurisdiction by the Petitioner.

III.

QUESTIONS PRESENTED

The Respondent has no additions to the questions presented for review by the Petitioner.

IV.

STATUTES, RULES, AND REGULATIONS INVOLVED

The Respondent has no additions to those statutes, rules, and regulations cited by the Petitioner for consideration.

V.

STATEMENT OF THE CASE

The Respondent would respectfully refer this Court to the Summary of Facts contained in the Fifth Circuit's opinion, reprinted in Appendix A, pages 14-17, of the Petitioner's Brief, for an accurate and complete summary of the facts. The Petitioner's statement of the case is inaccurate in at least one important respect in that the Petitioner asserts that the "District Court held that the vessel was unseaworthy because the vessel did not have a 'slop chest' as required by 46 U.S.C. §670." The District Court never made such holding; its holding concerning unseaworthiness specifically excludes reference to the "slop chest" statute, which was applied only to the negligence findings. See the opinion of the District Court in Appendix D, pp. 40-42, of Petitioner's Brief.

VI.

ARGUMENT

A. THE COURT OF APPEALS HAS NOT CREATED AN OBLIGATION ON THE PART OF VESSEL OWNERS "WHICH GOES BEYOND THE REALM OF REASONABLENESS" OR WHICH IS "CONTRARY TO THE HOLDINGS OF THIS COURT."

The Petitioner, in asserting to this Court that the Fifth Circuit in its opinion below held that "a vessel owner is required to furnish crew members, including the captain of the vessel, with special footgear, and that to not do so renders the vessel unseaworthy," Petitioner's Brief at p. 5, has completely misrepresented that Court's decision. The only accurate representation of the Fifth Circuit's descrip-

tion of the duty of a vessel owner is that contained in the actual language of the Fifth Circuit's opinion. The Fifth Circuit was careful to describe the duty of the vessel owner regarding the supplying of footwear or other gear as follows:

> "In affirming the lower court's conclusion of unseaworthiness, we are not creating a general duty of a shipowner to provide all of its seaman with boots adequate for all foreseeable shore duties. Instead, the defendant needs to make boots available only for those crew members ordered to work under foreseeably adverse circumstances. Alternatively, the defendant can protect itself by sending ashore only those seaman who it has ascertained have the necessary footwear whether that footwear is provided by the shipowner or the sailor."

Webb v. Dresser Industries, 536 F.2d 603, 607 (5th Cir. 1976); See Appendix A of the Petitioner's Brief at p. 20.

Rather than placing an unqualified duty on the vessel owner, the Fifth Circuit has carefully stated that the vessel owner has a duty to provide footwear and other gear to the seaman only in cases in which it is *foreseeable* that such crew members will be ordered to work under adverse conditions. In failing to bring to this Court's attention this important aspect of foreseeability, which formed an integral part of the definition of the duty of the vessel in the Fifth Circuit's decision, the Petitioner has completely misrepresented to this Court the decision below and has completely distorted that Court's holding.

Moreover, the Fifth Circuit's statement of the duty of a vessel owner with regard to providing footwear or other protective gear finds support in a number of other deci-

sions. See, e.g., *White v. Rimrock Tidelands Inc.,* 414 F.2d 1336 (5th Cir. 1969) (allegation that Defendant shipowner did not provide protective boots or other safety equipment for seaman directed to enter tank containing caustic drilling mud stated a claim for unseaworthiness); *Johnson v. Warrior & Gulf Navigation Company,* 516 F.2d 73 (5th Cir. 1975) (finding stevedore's obligation to furnish longshoremen with proper shoes). Thus it is clear that the Fifth Circuit's statement of the duty of the vessel owner in this case is accurate and is supported by the case law, and the Petitioner cites no specific authority to the contrary. This point of argument should be overruled.

B. THE PETITIONER NEVER CONTENDED AT ANY TIME IN THE COURTS BELOW THAT A CAPTAIN SHOULD BE TREATED DIFFERENTLY THAN OTHER SEAMEN AND THE COURT OF APPEALS HAS CORRECTLY APPLIED THE APPLICABLE LAW TO THE PLAINTIFF/RESPONDENT.

The Petitioner raises for the first time in this Court the contention that the Plaintiff/Respondent "was not subject to a statutory obligation to follow orders as a seaman might be while at sea." See Petitioner's Brief at p. 7. The Petitioner is again misrepresenting to this Court its position in this case. The Fifth Circuit has specifically noted that the Petitioner, Dresser Industries, made no such contention during any stage of the trial or appeal of this case:

> "On appeal, Dresser Industries does not challenge Webb's contention that when he went to the bus station he was a seaman, acting on behalf of the

> ship. Nor does appellant dispute the district court's conclusion that Webb falls within the scope of coverage provided by both the Jones Act and the general maritime law. Moreover, no special problems as to the scope of the maritime law are presented by the fact that the injuries sustained here actually occurred on land, and Defendant makes no such contentions. [citations omitted]"

Webb v. Dresser Industries, supra at 605, note 3; Appendix A of Petitioner's Brief at p. 16, note 3.

Moreover, the Petitioner cites no authority whatsoever for the proposition that a captain of a vessel, or a mate acting in the capacity of captain in the absence of the regular captain, see *Webb v. Dresser Industries, supra* at 605, note 1, is treated differently than any other seaman under the applicable law. Since petitioner never raised this matter at any time during the trial or on appeal, and since Petitioner has thus waived any such contention, and since Petitioner cites no authority whatsoever in support of any such contention, even if properly raised, this point of argument should be overruled.

C. THE DIRECTIONS TO THE DISTRICT COURT BY THE COURT OF APPEALS REGARDING COMPARATIVE NEGLIGENCE ARE NOT "TOO RESTRICTIVE" AND ARE NOT "IN DIRECT CONFLICT WITH ACCEPTED TORT PRINCIPLES."

The Fifth Circuit, in its opinion below, accurately and succinctly summarized the principles of comparative negligence as applied to the facts in the instant case. See *Webb v. Dresser Industries, supra* at 607-610; see Appendix A of the Petitioner's Brief at pp. 21-26.

Moreover, the Fifth Circuit vacated and remanded the instant case to the District Court for the specific purpose of requiring the District Court to consider the issue of comparative negligence and to make a finding of fact and conclusion of law in that regard. Since the Petitioner cites no authority whatsoever in support of his contention that the directions to the District Court by the Fifth Circuit regarding comparative negligence were "too restrictive" or were "in direct conflict with accepted tort principles," and since the District Court has not yet had a chance to make findings of fact and conclusions of law with respect to comparative negligence and enter a final judgment in that respect, this point of argument should be overruled.

D. THE COURT OF APPEALS, IN UPHOLDING THE DISTRICT COURT'S FINDINGS AND CONCLUSIONS REGARDING UNSEAWORTHINESS, IS UNDER NO OBLIGATION TO ISSUE AN ADVISORY OPINION TO THE PETITIONER REGARDING 46 U.S.C. §670.

The Fifth Circuit, in affirming the District Court's findings and conclusions regarding unseaworthiness, did not discuss the negligence theories advanced by the Respondent in the District Court. The District Court found as an alternate theory in support of its judgment that the Plaintiff/Respondent could recover under the Jones Act, 46 U.S.C. §688 et seq. The basis of the District Court's decision was its determination that the Petitioner Dresser Industries (1) negligently failed to maintain a safe place to work and (2) violated a sefety statute, thus requiring a finding of negligence *per se*. The safety statute is the so-called "slop chest statute," 46 U.S.C. §670. The Fifth

Circuit carefully explained its reasons for upholding the District Court's findings and conclusions regarding unseaworthiness, see *Webb v. Dresser Industries, supra* at 606-07; Appendix A at p. 18-20 of Petitioner's Brief, and carefully explained that it was pretermitting any consideration of the negligence issue:

> "Having affirmed the lower court's decision that the *M/V CANADIAN OLYMPIC* was unseaworthy, we need not rely on the district court's alternative Jones Act theories, and therefore, we pretermit any discussion of the negligence issue.

Webb v. Dresser Industries, supra at 607, note 5; Appendix A at p. 21, note 5, of Petitioner's Brief.

When there are several theories upon which a judgment may be upheld, one of which is sufficient under the evidence and the law to support the judgment, an appellate court need not write in *dicta* regarding alternative theories to uphold that judgment. The Petitioner Dresser Industries is not entitled as a matter of right to an advisory opinion on other issues that were not necessary to a decision in this case.

E. THE COURT OF APPEALS DID NOT APPLY THE CLEARLY ERRONEOUS DOCTRINE TO FINDINGS OF FACT INDUCED BY ERRORS OF LAW.

The Petitioner asserts "[I]n this case the findings of fact were based upon an erroneous conclusion that the appellant was required to have a 'slop chest' on board the *M/V CANADIAN OLYMPIC*, yet the Court of Appeals applied the erroneous doctrine." This confused assertion is wrong for several reasons. First, findings of fact are not based on conclusions of law or applications of law; findings of fact are based on the evidence and proof adduced at the trial. Secondly, since the Fifth Circuit upheld the District Court's decision on the theory of unseaworthiness, and did not discuss the negligence theories, as explained above, there is no "erroneous conclusion" regarding the "slop chest statute," 46 U.S.C. §670, upon which an appeal can be based. Finally, with respect to the Petitioner's assertion that "the Appeals Court can correct those findings," Petitioner asserts no authority and the Respondent is aware of no authority for the proposition that an appellate court can "correct" findings of fact. This point of argument should be overruled as frivolous.

WHEREFORE, PREMISES CONSIDERED, the Respondent, EVERETT C. WEBB, respectfully prays that the Petition for a Writ of Certiorari to the United States Court of Appeals for the Fifth Circuit be in all things denied.

Respectfully submitted,

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